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Electronically Filed March 11, 2014

**UNITED STATES BANKRUPTCY COURT**

**DISTRICT OF NEVADA**

In re

MARTIFER AURORA SOLAR, LLC, a  
Nevada limited liability company,

- ☐ Affects Martifer Aurora Solar, LLC  
☒ Affects Martifer Solar USA, Inc.  
☐ Affects all Debtors

Case Nos. BK-S-14-10355-abl and  
BK-S-14-10357-abl

Jointly Administered under  
Case No. BK-S-14-10355-abl

Chapter 11

**DEBTOR'S OPPOSITION TO MOTION  
TO COMPEL DEBTOR TO ACCEPT OR  
REJECT EXECUTORY CONTRACT,  
AND FOR COURT DIRECTION AS TO  
PROPERTY**

**Hearing Date: March 20, 2014  
Hearing Time: 11:00 a.m.**

Martifer Solar USA, Inc. ("Martifer USA" or the "Debtor"), by and through its proposed counsel, the law firm of Fox Rothschild LLP, hereby submits its Opposition (the "Opposition") to Alternative Energy Financing, LLC's ("AEF") *Motion to Compel Debtor to Accept or Reject Executory Contract, and for Court Direction as to Property* (the "AEF Motion") [Dkt #236] and states as follows:

1. On March 11, 2014, the Debtor filed its *Motion to Assume Settlement Agreement with Alternative Energy Financing, LLC* [Dkt #370] (the "Assumption Motion"), which seeks entry of an order (i) authorizing and approving the Debtor's assumption of the Settlement Agreement (as defined in

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the Assumption Motion); and (ii) directing AEF immediately to remit the Phase V Rebate (as defined in the Assumption Motion) under the terms of the Settlement Agreement. Concurrently with the filing of the Assumption Motion, the Debtor filed the *Declaration of Klaus Bernhart* in support thereof [Dkt #371] (the "Bernhart Declaration"). The Settlement Agreement is annexed as Exhibit "A" to the Bernhart Declaration.<sup>1</sup> The Debtor is seeking to have the Assumption Motion heard at the same time as the AEF Motion. The AEF Motion should be deemed to have become moot by the Debtor's filing of the Assumption Motion.

2. Nonetheless, Debtor would like to correct the record with respect to some serious errors made in the AEF Motion:

(a) AEF alleges that the Debtor somehow breached the Settlement Agreement based on a representation in an "asset agreement accompanying the settlement agreement." AEF Motion, p. 2, ¶ 6; p. 3, ¶ 22. However, this is not true for at least the following two reasons:

(i) The Debtor did not falsely misrepresent that it was not contemplating bankruptcy. Rather, that representation was mistakenly left in the final asset purchase agreement after AEF was informed it was intended to be deleted. *See* Bernhart Declaration, ¶ 26.

(ii) [REDACTED]

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<sup>1</sup> Debtor filed an *Ex Parte Motion to File Under Seal (1) Unredacted Motion to Assume Settlement Agreement with Alternative Energy Financing, LLC; (2) Unredacted Declaration of Klaus Bernhart in Support of Motion to Assume Settlement Agreement with Alternative Energy Financing, LLC; and (3) Opposition to Motion to Compel Debtor to Accept or Reject Executory Contract, and for Court Direction as to Property* [Dkt #369] to file, in part, unredacted versions of the Assumption Motion and supporting declaration under seal due to the confidentiality provisions of the Settlement Agreement.

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[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] The asset purchase agreement was merely an ‘ancillary’ agreement to the Settlement Agreement (Exhibit B).

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] There is (and can be) no allegation that the Debtor has failed to take any of the actions necessary toward the submission of the Rebate and Grant applications.

(b) By seeking to retain \$150,000 from the Phase V Rebate (AEF Motion, p. 5, ¶ 32 & ll. 17-19), AEF is trying to alter the terms of the Settlement Agreement which, if assumed, must be assumed *cum onere*. [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

(i) [REDACTED]

(ii)

Thus, neither the \$40,000 payment nor the \$110,000 payment is currently due to AEF. Adequate assurance of the Debtor's future performance of these payments is amply demonstrated by: (1) the Debtor's undertaking to set aside \$40,000 from the Phase V Rebate to pay the second installment to AEF when it comes due under the Settlement Agreement [REDACTED]; and (2) the magnitude of the Rebates and Grants (aggregating approximately \$2.7 - \$3.2 million) [REDACTED]. See Bernhart Declaration, ¶ 18.

(c) AEF claims that it retains a security interest in the various Rebates and Grants. AEF Motion, p. 2, ¶ 13. [REDACTED] AEF failed to demonstrate how the security interest granted was perfected and the UCC search attached hereto as an exhibit do not reflect any AEF perfection.

3. In addition, the proposed disbursement in the AEF Motion ("AEF's List") contains numerous inaccuracies. AEF Motion, pp. 3-4, ¶ 23. On March 7, 2014 Debtor filed its *Motion for Authority to Pay Certain Subcontractor Claims: Memorandum of Points and Authorities; and Proposed Order* [Dkt #340] (the "Subcontractor Motion"), requesting the Court to authorize the Debtor to use the proceeds of the Phase V Rebate to pay the Subcontractors listed in Exhibit "A" (the "Debtor's List") to the Declaration of Klaus Bernhart filed in support thereof (all of whom have executed releases). The Subcontractor Motion is set for hearing on April 14, 2014. The discrepancies between Debtor's List and AEF's List are as follows:

- All Phase Electric Supply Co. has already been paid \$357.96; therefore no amount is due.
- One of the amounts due to Converse Professional Group is \$1,198.65 (Debtor's List), not \$1,199.65 (AEF's List).
- The amount due to California CEC, LP, including attorneys' fees and costs, is \$186,791.90 (Debtor's List), not \$164,913.90 (AEF's List).
- The amount due to Hanwha Solarone (QiDong) Co. Ltd. is \$30,000 (Debtor's List), not \$50,000 (AEF's List).
- AEF's List omits AECOM Technical Services, Inc. (owed \$45,405.62) and Xeralux, Inc./Sensity Systems, Inc. (owed \$20,482.18).
- As described above, AEF is not yet due the \$150,000 in payments under the terms of the Settlement Agreement.
- AEF is not entitled to legal fees.

WHEREFORE, Debtor respectfully requests that the Court deem the AEF Motion moot in light of Debtor's filing of the Assumption Motion and give no weight to AEF's inaccurate assertions in the AEF Motion.

Dated this 11th day of March, 2014.

**FOX ROTHSCHILD LLP**

By s/ Brett A. Axelrod  
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QUERY - DEBTOR-NAME(MARTIFER &  
SOLAR & USA)

DATABASE(S) - UCC-ALL

<u>Rank</u>	<u>Debtor</u>	<u>Type</u>	<u>Other Party</u>	<u>Location</u>	<u>Filing Date</u>
1.	MARTIFER SOLAR USA INC	FINANCING STATEMENT	RENEWABLE SO- CIAL BENEFIT FUNDS, L3C	CA	08/05/2011
2.	MARTIFER SOLAR USA INC	TERMINA- TION	<a href="#">CALIFORNIA BANK &amp; TRUST</a>	CA	11/29/2012
3.	MARTIFER SOLAR USA INC	TERMINA- TION	<a href="#">CALIFORNIA BANK &amp; TRUST</a>	CA	11/29/2012
4.	MARTIFER SOLAR USA INC	FINANCING STATEMENT	<a href="#">CATHAY BANK</a>	CA	11/27/2012
5.	MARTIFER SOLAR USA, INC.	ORIGINAL	RENEWABLE SO- CIAL BENEFIT FUNDS, L3C	CO	08/05/2011